In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF.

THOMAS CRADOCK HUGHES,
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Opinions Below.

The petitioners were convicted of the crime of Murder in the First Degree in the County Court of Kings County, State of New York, after a trial which lasted eleven weeks (R. 4030). On appeal to the Court of Appeals, the highest court of the state, the judgments of conviction were affirmed by a divided court. Exhaustive majority and dissenting opinions were written which are officially reported in 289 N. Y. 181-243. Thereafter, petitioners made a motion for reargument which was denied with a *Per Curiam* opinion officially reported in 289 N. Y. 244.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended [28 U. S. C. A. Sec. 344 (b)] upon the claim that petitioners were denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The facts in relation to the requirements of this statute were set forth at pages 36-39 and 46-47 of our brief in opposition to the petitions for a writ of certiorari. They need not here be repeated. It suffices to note that on February 15, 1943, this Court denied certiorari, but one month later, upon an application for rehearing, the order was vacated and certiorari was granted.

Questions Presented.

Petitioners' "Specifications of Error to be Urged" (Brief, pp. 35-36) raise the following questions:

1. Whether the trial "was held in a poisoned atmosphere in which a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had."

2. Whether the trial court "prevented the impaneling of a fair and impartial jury" and whether the Court of Appeals arbitrarily refused to review rulings on challenges for actual bias.

3. Whether "evidence relevant and material to the defense, in the possession of the prosecution, was suppressed by the State."

4. Whether the trial court's charge to the jury and comments during the trial and the prosecuting attorney's summation "combined to deprive petitioners of the right to fundamental fairness in the trial."

5. Whether the denial of Capone's motion for a trial separate from Buchalter and Weiss deprived him of due process of law.

Statement of the Case.

In July, 1935, the Governor of the State of New York appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into "all acts of racketeering" and "all organized crime." Mr. Thomas E. Dewey was designated to conduct the investigation as special prosecutor (R. 1370-1375, Peo.'s Exhs. 33 and 34). At that time the petitioner Buchalter, referred to by the witnesses throughout the trial as Lepke, was a leader of organized crime who for years had thwarted apprehension and punishment. In the language of *his own counsel* in summation to the jury, "Lepke was not just an ordinary racketeer" (R. 3589); he "was being looked for by Dewey as king of the flour racket and king of the crime racket" against whom there were "thousands of complaints in extortion totaling half a million dollars" (R. 3584-3585; 289 N. Y. at pp. 184-185).[1]

Buchalter had on his payroll professional murderers (R. 2211, 2213-2214, 2228, 2232, 2245-2246), "sluggers", strike-breakers (R. 1796-1798, 1906-1907, 1917, 1921, 2228), and collectors of extortion moneys (R. 1990-1992). In this group was his chief aide, the petitioner Weiss (R. 2213, 2215-2216, 2365-2366) who, together with Harry Strauss, a member of an underworld association known as "The Combination," of which petitioner Capone was one of the leaders (R. 2425-2427, 2565-2566), fired the shots that killed the deceased in the case at bar (R. 740-741, 4042-4043; 289 N. Y. at pp. 194-195).[2]

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1. The jury was apprised of these facts by Buchalter's counsel, not by the prosecuting attorney, in an attempt to induce the jury to believe that Buchalter, having committed only "a possible misdemeanor" against Joseph Rosen and having many more serious charges to worry about, would have no motive to order Rosen's death (R. 4031-4032; 289 N. Y. at p. 184).

2. Strauss was not on trial, having been previously convicted and executed for the commission of a separate murder (R. 3041; 289 N. Y. at p. 193).

Another member of the organization was the people's witness Tannenbaum who up to the time of his arrest was Buchalter's employee for nine years (R. 2232; 289 N. Y. at p. 193). He took orders from Buchalter and Weiss and from "Gurrah" Shapiro (R. 2215-2216, 2365-2366; 289 N. Y. at p. 193). Shapiro was Buchalter's partner (R. 1329). In the course of his employment Tannenbaum's salary increased from thirty-five to one hundred and twenty-five dollars per week (R. 2214). In addition to being a slugger and strike-breaker in the clothing district (R. 2211, 2228), he participated in six murders and helped to "dump the body of a dead man" for "disposition" and "concealment" (R. 2228, 2245-2246).

The witnesses Magoon and Bernstein were Capone's employees (R. 2425-2427; 289 N. Y. at pp. 193, 194). Magoon's salary started at forty dollars a week and later rose to seventy-five (R. 2567). He always obeyed "orders and instructions" from his superiors (R. 2427-2428). He participated as the "wheel-man" in two murders, delivered the car to be used in still another murder, and helped to dispose of an empty gasoline can, the contents of which had been used to burn the body of the victim in a murder committed by Strauss and others (R. 2470-2471; 289 N. Y. at p. 193; see also *People* v. *Goldstein and Strauss*, 285 N. Y. 376).

As for Bernstein, he performed many "jobs" for Capone (R. 695) and committed crimes whenever he got "orders from the mob" (R. 768, 770, 776, 777). He helped bury a dead body (R. 778-779), and in the instant case drove the "get-away" car under orders and instructions of Capone and Weiss. Capone taught him the route and aided Weiss and the others to make their escape after the murder was committed (R. 714-716, 720-721, 745-748; 289 N. Y. at pp. 194-195).

The record further shows that the witness Paul Berger and one Danny Fields acted not only as Buchalter's agents in the collection of extortion money (R. 1990-1992) but also as intermediaries between Buchalter and corrupt labor

union officials affiliated with the Amalgamated Clothing Workers of America (R. 1317-1320, 1800-1801; 289 N. Y. at p. 186). Buchalter and his partner Shapiro were on the union payroll for many years (R. 1299, 1800-1801, 1943). They participated in determining who should have control over certain of its Locals, who should occupy office, and how strikes should be conducted (R. 1796-1801, 1310-1316). One of the union officials who was kept in office as business agent through Buchalter's domination was the witness Max Rubin (R. 1313-1314; 289 N. Y. at pp. 185-187).

To render their control and influence over the union more profitable, Buchalter, Weiss and Shapiro acquired various interests, as undisclosed principals, in concerns engaged in the manufacture and transportation of clothing, which the union officials permitted to be conducted as non-union shops (R. 526, 1323, 1628, 1634, 1932, 1934, 2968-2969).

Competition by other non-union concerns would, of course, lessen Buchalter's profits. One of such competitors was Joseph Rosen's clothing-trucking company. It operated in competition with the Garfield Express, a non-union concern in which Buchalter became a partner. Consequently, in the course of a general stoppage of all trucks carting clothing in and out of New York City, Buchalter forced Rosen out of business, and the Garfield profited materially (R. 4033-4034; 289 N. Y. at pp. 186-187). The meeting at which Rosen was ordered to give up his business is briefly described in the opinion of Judge Conway as follows (289 N. Y. at p. 186):

> "Buchalter told Rubin he wished to see Rosen and they met at the office of one Weiner, a former business associate of Buchalter. Rubin, Danny Fields and one Gurrah were present. Rosen told Buchalter that the Pennsylvania business was the only thing he had in the N. Y. and N. J. Co., and that if that were lost that he would lose everything. Buchalter then said that he wished to see Rosen's books. In response to a telephone message, they were brought by Rosen's

daughter, Sylvia, who was a witness upon the trial.[3] Buchalter and Gurrah then went over the books and told Rosen what business he could not take. Rosen said he would be ruined. Rubin told him 'not to hit his head against a stone wall.' Buchalter then promised that they would do something for him and Rosen left."

This brings us to Buchalter's efforts to thwart investigation of his criminal activities. His technique of circumventing the law was revealed by him to Mr. Edward C. Maguire who was the attorney for the Local of which Rubin was business agent. Mr. Maguire was a witness for the people (R. 1757-1775) about whose testimony petitioners' brief says nothing.

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3. At page 3 of petitioners' brief the statement is made that:

"The *entire* case against petitioners depended upon the testimony of the witnesses Bernstein, Rubin, Berger, Tannenbaum and Magoon.". (Italics ours.)

And at page 32:

"The prosecutor must have known that the testimony of the widow and children of the deceased was so fantastic as to be beyond the trial court's considerable capacity for credence. Yet they were put before the jury to enhance, by the sympathy which their bereavement naturally induced, the prejudice against petitioners who were accused as the cause of their sorrow. Weeks later, *their testimony was stricken from the record* (R. 3525-3534), but by that time their appearance on the witness stand had had full effect on the jury." (Italics ours.)

These statements are in direct conflict with the record facts. In addition to the witnesses named by petitioners, Rosen's daughter and three other witnesses (Maguire, Aman and Bell), whose testimony will later be discussed, supplied highly material proof. The testimony of Rosen's daughter concerning the conference at which Buchalter ordered her father to give up his business appears at pages 564-584 of the record. It was not adduced for "sympathy" or "prejudice" but in corroboration of similar testimony given by the witness Rubin (R. 1329-1332). Nor was it stricken from the record. A motion to strike this testimony was expressly denied (R. 3529). The same is true as to the testimony of Rosen's son (R. 3526-3528).

In connection with investigations that were being conducted by the authorities Mr. Maguire, in Buchalter's presence, advised Rubin not to become a fugitive from justice (R. 1761). Buchalter disagreed and told Mr. Maguire that,

> "If witnesses are not available, investigations collapse" (R. 1762; 289 N. Y. at p. 189).

It was in line with this policy that Buchalter, after Mr. Dewey was appointed by the Governor of the State to investigate "all acts of racketeering" and "all organized crime," sent money to Joseph Rosen with instructions to leave the city and to stay away until he was told to return (R. 1360; 289 N. Y. at pp. 187-188). Later, when Buchalter learned that Rosen threatened to go to Mr. Dewey, he said to Rubin:

> "Well he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all" (R. 1365; 289 N. Y. at p. 188).

On the same day Buchalter gave the necessary instructions to his chief aide Weiss and to his employee Berger (R. 1804-1807). Within forty-eight hours Rosen's body was found riddled with seventeen bullet holes (R. 343).

As we have already noted Buchalter's orders were carried out by Weiss, Capone, Berger, Bernstein and others. Weiss together with Strauss fired the shots; Capone aided in planning the murder and in the escape. On the day following Rosen's death Weiss rendered his report to Buchalter who expressed his satisfaction with the way the job was done (R. 2222-2224). In short, as Chief Judge Lehman said:

> "Joseph Rosen was killed on September 13, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the ne-

> farious purposes of the gang. * * * The accusing witnesses *and the defendants* were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac" (289 N. Y. at pp. 222, 228).[4]

The foregoing facts do not yet complete the background of this case. It is necessary to note what happened to witnesses other than Rosen. Danny Fields, who it will be recalled was present with Rubin at the meeting where Buchalter ordered Rosen to give up his business, fled from the Dewey investigation on Buchalter's instructions (R. 1942, 1956, 1978). Fields is no longer alive (R. 1319). Rubin, too, was sent away by Buchalter to hide out until the investigations in Manhattan and Brooklyn were over. Buchalter sent him to Salt Lake City, New Orleans and to various other cities throughout the country (R. 1383-1419, 1814-1821; 289 N. Y. at pp. 189-190).

But that was not all. After successfully keeping Rubin away for about a year, Buchalter was faced with Rubin's

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4. Petitioners stress the depraved character of some of the people's witnesses, a fact which was quite apparent to the jury and of which they were frequently reminded. The crux of the matter is that "in fixing the blame for such a crime as we are here considering the state is not likely to discover witnesses of high character" (*People* v. *Cohen*, 223 N. Y. 406, 422). These witnesses were petitioners' employees. "In the very nature of things horrible events such as the one narrated in this record are not witnessed, except it be by mere chance, by people of savory history and clean, moral lives. This record shows that an awful crime was committed in defiance of law for some specific purpose and pursuant to a deliberate plan. The crime was neither an accident nor the result of heated passion. To determine who were the persons guilty of the crime there was no choice of witnesses. It was necessary to take the testimony of such persons as saw the occurrence and of those who had knowledge of facts leading up to the homicide" (*People* v. *Seidenshner*, 210 N. Y. 341, 358).

refusal to continue to remain in hiding outside the State of New York. Rubin, however, was "a key witness in the trial of the instant case" (289 N. Y. at p. 216). As a warning to Rubin, Buchalter asked him how old he was, and, on being told, said, "It was a ripe age" (R. 1424, 4038). Thereafter Weiss told Berger that "We got some information that Max Rubin is squealing and he has got to be hit" (R. 1838, 4039, 4064). Capone told Magoon, "Rubin is hurting Lep (meaning Buchalter), and we got to hit him in the head and get rid of him" (R. 2453-2454). In the words of the majority opinion of Judge Conway:

> "Defendant Buchalter's efforts to keep the witness Rubin out of town, as indicated in Rubin's testimony, indicate that Buchalter as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, or any charge which might lead the District Attorney to the uncovering of those responsible for the Rosen murder. * * * From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Buchalter's statement to Mr. Maguire that 'If witnesses are not available, investigations collapse'" (289 N. Y. at pp. 216-217).

Accordingly, a few days after Rubin testified before the grand jury he was shot through the head, the bullet entering the back of his neck and emerging at the bridge of the nose in close proximity to the right eye (R. 2371-2375). The shooting was planned and directed by Weiss (R. 1838-1845, 1854, 1859-1860). Fortunately, however, Rubin survived.

About one month after Rubin was released from the hospital he was questioned by an assistant district attorney of Kings County concerning the Rosen murder. Due to overpowering fear engendered by the almost successful attempt

to kill him. Rubin denied that he knew anything about the case (R. 2408, 2419-2420).[5]

That Rubin's fear was fully justified is further evident from the fact that when Weiss learned Rubin came out of the hospital alive, he resolved to "catch up with him" (R. 1855) and enlisted the aid of Capone and Capone's "Combination" in a second attempt to kill him (R. 2434-2436, 2446-2447, 2453-2454; 289 N. Y. at p. 194). But Rubin was under police protection and their plan had to be abandoned (R. 1868, 2458-2459; 289 N. Y. at p. 192).

In June, 1937, Buchalter told Berger that "things were getting too hot" and that he (Buchalter) would have to go away (R. 1831; 289 N. Y. at p. 192). The following month he disappeared (R. 2271). Rewards were then posted by the Federal and State Governments for information leading to his arrest (R. 46, 47, 48). It was not, however, until August, 1939, that Buchalter decided to surrender to the Federal Bureau of Investigation (R. 1889), as a result of which he was convicted in the United States District Court for the Southern District of New York and was sentenced to a term of imprisonment in the Federal Penitentiary at Leavenworth, Kansas (R. 126).[6]

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5. At page 6 of petitioners' brief we are told: "It was shown, however, that in December, 1937, when Rubin would have implicated Buchalter if he could (R. 2400-01), as he had already implicated him in other crimes, he had made a statement to Mr. McCarthy * * * in which Rubin completely exculpated Buchalter of any complicity in the Rosen murder." The reason for Rubin's prior statement should, however, be added. As he explained: "I had just been shot in the head. I went to the Grand Jury, where anybody (*sic*) knew where I was. I was shot in the head" (R. 2408), and gave "untruthful answers to Mr. McCarthy due to fear of Lepke" (R. 2420). In view of this fact coupled with Rubin's knowledge of the reason for the murder of Rosen, we can readily understand why he then "exculpated Buchalter of any complicity in the Rosen murder".

6. The Federal trial, just as the trial at bar, was preceded and accompanied by wide newspaper publicity. See, *e. g.*, R. 45-51, containing the New York Times headlines as collated in its Index under Buchalter, an exhibit filed by counsel for Capone.

In March, 1940, Buchalter's employee Tannenbaum was arrested (R. 2315) and by court order was placed in police custody as a material witness (R. 2231, 2346). Weiss then informed Berger that "It looks like Allie (Tannenbaum) is talking and I will have to duck" (R. 1872, 1875). Shortly thereafter Weiss fled from the State. He was apprehended a year later by agents of the United States Bureau of Narcotics in Kansas City, Missouri, where he was hiding under an assumed name and other disguise (R. 2607-2698).

The Attorney General of the United States then consented to the production of Buchalter and Weiss for the purpose of standing trial in Kings County upon condition that they "should at all times remain in the custody of the United States Marshal of the Eastern District of New York until the conclusion of the trial" (R. 126-127).[7]

Proceedings Prior to Trial.

On May 9, 1941, Buchalter was brought to the County Court of Kings County to be arraigned on the indictment. He requested permission to confer with members of his family, who were in the courtroom, "about getting counsel". Permission was granted. He then requested an adjournment for one week "within which to get counsel to appear for him on the arraignment". This was consented to, and the matter was adjourned (V. 1-4).[8]

On the adjourned date he appeared by counsel who stated that "the defendant stands mute", and, upon the ground that there was a serious question as to the court's jurisdiction to be considered, requested another adjournment for two weeks. Again, the request was granted on consent (V. 4-8).

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7. This was in accord with this Court's decision in *Ponzi* v. *Fessenden*, 258 U. S. 254.

8. The designation "V" is used to distinguish pages in Volumes VI through VIII from pages in preceding volumes which are designated "R".

At the third appearance Buchalter refused to plead to the indictment, his counsel stating "We seriously doubt that this Court has any jurisdiction to try this defendent" (V. 8). This time the prosecuting attorney objected to any further delay. A plea of not guilty was then entered by the court and the case was set for trial for July 14th, six weeks thence (V. 11-13). Whereupon, counsel objected that six weeks would not give them "adequate opportunity to prepare for the defense" (V. 14).

Buchalter's next move was to sue out a writ of habeas corpus in the United States District Court seeking to be returned to Leavenworth. He contended that the Attorney General had no right to order his transfer to Kings County. The writ was dismissed, an opinion being written by District Judge Conger (R. 127). Thereupon, he applied to the Circuit Court for leave to appeal and for a stay of the trial. The application was denied by Judge Learned Hand (V. 25-26).

Soon thereafter the district attorney made a motion for an order directing the drawing of a panel of special jurors to attend at the trial on July 14th, the date originally fixed by the court (R. 127). This motion was made pursuant to the provisions of Section 749-aa of the New York Judiciary Law which permits the defendant or the district attorney to apply for such a jury where the subject matter of the indictment "has been widely commented upon" (R. 127, 173; Appendix, *infra*). Subdivision 2 of that statute provides, in part, as follows:

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *." (Appendix, *infra;* quoted by Court of Appeals 289 N. Y. at p. 221.)

As stated by Judge Conway, "*Each of the defendants consented to be tried before such special jury*" (289 N. Y. at pp. 220-221; see also R. 127-128, 165). Counsel for Buchalter submitted an affidavit in which he said:

> "6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury."

Counsel for Weiss likewise consented. In his affidavit he said:

> "That deponent does not oppose the application for the trial of the indictment before a special jury, * * *."

Accordingly, the court order after reciting that counsel for each defendant

> "appeared and consented to the granting of the motion for a special jury."

directed that a panel of two hundred and fifty talesmen be drawn, and, since counsel claimed that they needed more time to prepare for trial, the order postponed the trial date to August 4th (R. 127-128).[9]

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9. Petitioners failed to cause their affidavits and the court order to be printed in the record. Instead, this Court was told in Buchalter's petition for certiorari that,

> "Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the court at *nisi prius* in granting the motion for a special jury *misstated the fact* in recording that there was consent."

In view of that statement we obtained permission from the Clerk of this Court, by letter dated Dec. 24, 1942, to file certified copies of the motion papers and court order and to print them as an Appendix to our brief in opposition to certiorari. Petitioners, therefore, do not now repeat their former assertion, but characterize their unequivocal consent as "a failure to object" (Brief, p. 52).

After notice to petitioners, the provisions of said order were complied with, a Justice of the Supreme Court presiding at the selection of the panel (R. 128). But despite their consent to proceed to trial before a special jury drawn from the citizens of Kings County, pursuant to which two hundred and fifty talesmen were already drawn and notified to appear in court (R. 128, 165), petitioners decided to apply for a change of venue to a place "outside the City of New York" (R. 76-77).

Buchalter urged that he could not receive a fair trial in the City of New York because for "the past two years" he received widespread notoriety by newspaper, radio, and magazine, "as society's most dangerous enemy", as the "master mind" of all criminals and as "a vicious racketeer" (R. 76-109, 121). After quoting many newspaper clippings his counsel admitted under oath that the district attorney was not responsible for the notoriety, stating,

> "No doubt many of the quotations attributed to the District Attorney of Kings County and his various aides as set forth in the exhibits annexed to this affidavit, were improper in the sense that they were made without authorization" (R. 108).[10]

Indeed, the publicity given to Buchalter's long record of crime dated back to at least the year 1935 and was nation-wide in scope (R. 36, 42, 45-54, 129-130, 165-166; V. 28).

Weiss and Capone joined in the motion for a change of venue, their argument being that because of the unfavorable notoriety received by Buchalter, they, as co-defendants,

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10. In Buchalter's petition for certiorari (p. 48) the accusation was made that "it is beyond cavil that he (the prosecuting attorney) was responsible for this propaganda". The brief now filed modifies the accusation. Although the expressions "propaganda" and "newspaper campaign in advance of arraignment" are still retained (p. 10), petitioners reluctantly concede that the "publicity may not have been the fault of the State" (p. 42).

would be indirectly affected by the alleged prejudice against him (R. 129, 4123-4126). Capone has maintained this position despite the subsequent admission by his counsel, in a sworn affidavit seeking a separate trial, that,

> "The defendant Capone has been practically unheard of in the newspapers and has received no publicity which would cause members of a jury to consider him a sinister or notorious character" (R. 56).

Significantly, not a single affidavit of a resident of the community was submitted to show that there existed any prejudice which would prevent or hinder a fair and impartial trial. The applications were based upon the speculation and surmise of counsel and the report of a hired investigator whose affidavit was patently worthless (see Justice Daly's opinion, R. 166). The affidavit of Buchalter's brother, a sentence of which is quoted in a footnote at page 34 of petitioners' brief, was even worse than the one submitted by the hired investigator. In that affidavit the brother asserted that an assistant district attorney assigned to try the case, whose name he did not disclose, told him: "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation" and that "current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction" (R. 111). It was evident from the very wording of the quoted statements that they were concocted to meet the occasion. The two assistant district attorneys assigned to try this case denied under oath that they ever said, in words or substance, any such thing (R. 123-124, 131).

At all events, after a full hearing was had in the Supreme Court the motions were denied with an opinion that they were devoid of merit (R. 165-168). Later, a second application, based solely upon additional newspaper clippings, was

made by Buchalter before a different Justice of the Supreme Court who likewise denied it (R. 155-163, 175-176).[11]

Finally, on August 4th the case was called for trial. The district attorney stated he was "ready" (V. 15). Counsel for Weiss said, "defendant Weiss is ready" (V. 15). Counsel for Buchalter, however, said,

> "This defendant refuses to answer ready, because he has not been afforded a reasonable opportunity to properly prepare his defense. He, by virtue of that, maintains that he cannot receive a fair trial" (V. 16).

In support of this position counsel stated that they "deemed it necessary" to interview Buchalter's associate, Jacob Shapiro, who was then a Federal prisoner and who "could and would give information *vital and essential to the defendant's defense*" (V. 16); that to enable them to interview Shapiro they sued out a writ of habeas corpus, but that the Federal Director of Prisons caused Shapiro's transfer to Springfield, Missouri, "*as a device to avoid an order on the writ*" and "bluntly" refused to grant permission for an interview (V. 17-18). It was further contended that although the Attorney General of the United States turned Buchalter over to the state authorities for trial, "*he has deprived him of the opportunity to prepare and present his defense*" (V. 23).

Thereupon, the trial court and the prosecuting attorney agreed to arrange with the Attorney General of the United

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11. The statement in Buchalter's petition for certiorari (p. 37) that "the Court of Appeals *refused to review* the question of whether * * * a change of venue should have been granted" is in direct conflict with the written opinions of that court. The question was expressly reviewed on the original appeal (280 N. Y. at pp. 220-221) and on the motion for reargument (280 N. Y. at p. 245), and on each occasion it was held that the question had been correctly determined.

States to have Shapiro transferred to a Federal prison in New York City where he could be interviewed (V. 33-35).[12]

After the court marked the case ready for trial, it developed that 26 jurors failed to appear and that 129 jurors offered either legal excuses or asked to be relieved from jury duty because of summer vacation commitments (V. 30-31). Under these circumstances the prosecuting attorney suggested that the case be adjourned until September (V. 33) which was the month originally requested by defense counsel (V. 13). When the court indicated that it would follow that suggestion, counsel for Buchalter, who, only a few hours before, refused to answer ready upon the grounds that they had "not been afforded a reasonable opportunity to properly prepare" for trial (V. 16), suddenly announced that they were fully prepared and opposed the adjournment in these words:

> "*We are as ready as we will ever be* and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute" (V. 35-36).

The court in deciding to postpone the trial until September 15th said:

> "This jury situation is unprecedented. It is practically a run-out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit to that position. To arbitrarily combat it would smack of coercion and would tend to undermine that quality of jury service which is essential for a fair trial of this case" (V. 44).

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12. The record does not disclose the result of whatever steps were taken. But it is significant that Shapiro was not called as a witness and that no claim has ever been made, not even now, that the defense was deprived by either the Federal or State authorities of an opportunity to interview or call Shapiro as a witness.

The Jury Panel.

Petitioners tell us that newspaper publicity "resulted in a panel so infected with the virus of prejudice, that it was impossible to obtain a fair and impartial trial" and that they were compelled to select a jury "from a panel mentally conditioned to convict" (Brief, pp. 14, 42).

We shall soon demonstrate that a fair and impartial jury was in fact selected. Let us first consider an important fact concerning the panel.

When the case was marked ready for trial on August 4th and before it was postponed to September 15th, Judge Talley, one of the counsel for Weiss, called the court's attention to some newspaper items about the case (V. 40). In response, the court said:

> "The Court: There is just a little matter referred to by Judge Talley and that is in relation to this present panel being influenced by these newspapers. I take it that you mean that on account of being on the panel their attention, their interest, will be particularly directed?
>
> Mr. Talley: It undoubtedly has been directed.
>
> The Court: I submit this for consideration. In the event of the case being continued until after the extremely hot weather and until bearable trial weather, regardless of when it is, *that if all counsel for the defense agree, then the Court would be agreeable to drawing of additional talesmen and upon those talesmen coming here the Court will then, the counsel for all defendants agreeing, discharge the present talesmen*, but those talesmen will not have to be drawn right away and their attention would not therefore be particularly directed, their interest would not be particularly directed, by being drawn as talesmen, to the stories now being carried in the New York American" (V. 41).

Later, when the court postponed the trial it again said:

> "Should a new panel be desired, counsel for all the defendants should agree on that" (V. 45).

At no time, however, did counsel for petitioners accept the court's offer to discharge the panel. If, as they now complain, the panel was "so infected with the virus of prejudice that it was impossible to obtain a fair trial", why did not counsel take the opportunity given to them by the court to obtain a new panel? The obvious answer is that counsel knew they could, and in fact did, select from the panel a fair and impartial jury.

Let us see.

The Trial Jury.

Throughout their brief petitioners repeatedly assert that they were not tried by a fair and impartial jury (pp. 20, 36-37, 41, 43, 46, 51, 77). What are the facts?

(a) *The First Nine Jurors.*

The record shows that the first nine jurors who participated in the verdict were pronounced "satisfactory to the defendants":

1.	Charles E. Stevens,	V.	356–391
2.	Chester T. Prentice,	"	752–776
3.	Charles A. Murphy,	"	983–1000
4.	David N. Day,	"	1112–1119, 1133
5.	Henry T. Gill,	"	1207–1221
6.	James B. Cummings,	"	1232–1238, 1288
7.	George B. Hall,	"	1310–1315, 1377
8.	Harold F. Cross,	"	1477–1487
9.	James L. Edghill,	"	1859–1891

These jurors were pronounced "satisfactory" by able and experienced counsel *when their peremptory challenges had not yet been exhausted.* Indeed, before the next talesman

was questioned the defense *still had one more peremptory challenge* (V. 1928-1929). None of the nine jurors above listed was challenged for bias, actual or implied. And it is inconceivable that if there were the slightest doubt about the fairness of any one of these jurors that counsel would have deliberately refrained from excusing him peremptorily.

This brings us to a consideration of the facts in relation to petitioners' argument concerning the foreman of the jury, Charles E. Stevens. At pages 17-18 of their brief petitioners quote a clipped excerpt from the *voir dire* examination of Mr. Stevens, namely, that after being served with a notice to appear as a juror his office associates made some prejudicial remark about one of the defendants. Concerning this incident he told defense counsel that "if I had accepted what they were saying as facts and absorbed them as such, I could have possibly been prejudiced, * * * but if I am called upon to serve, it seems to me such a terrific responsibility that I can't understand why people who know nothing about it can attempt to influence a man who might have to make such a grave decision".

These excerpts are described by petitioners as "most significant" and at page 42 of their brief the following statement is made:

> "It has been seen that Mr. Stevens, who was sworn and acted as a juror, was faced with the necessity of staving off prejudicial influences. There can be no assurance that, despite his commendable efforts, he was not subconsciously affected, particularly since he still faced the prospect of justifying himself to his co-workers, should he vote for a verdict of acquittal."

We are constrained to say that the foregoing distorts the record to an amazing degree. The entire examination of Mr. Stevens appears in Volume VI at pages 356-391. At the time he was questioned petitioners had used only three of their thirty peremptory challenges given to them by law (V. 108, 181, 356; N. Y. Code of Crim. Proc. § 373). Mr.

Stevens was not challenged for cause, and a reading of his examination shows that no such challenge could fairly be interposed. If, as is now claimed, Mr. Stevens "was faced with the necessity of staving off prejudicial influences" and "the prospect of justifying himself to his co-workers should he vote for a verdict of acquittal", why did not counsel use one of their twenty-seven peremptorily challenges, instead of announcing "satisfactory to the defendants" (V. 391)? The conclusive answer appears in the record. We quote from the examination of Mr. Stevens conducted by Buchalter's counsel:

> "Q. Were you in any wise influenced by the making of that statement or those statements by your associate or associates? A. No, I resented their making them.
>
> Q. You resented their making them? A. Yes.
>
> Q. Did you express your resentment? A. Well, I said that I felt that the men were entitled to trial and that until they were judged guilty I did not see how anybody could make loose, irresponsible statements, such as I considered theirs to be.
>
> Q. You said then that you thought that that was an unjust thing for anybody to say? A. In substance, yes.
>
> Q. That was your feeling about it? A. Yes.
>
> Q. You particularly resented those statements being made to you in view of the fact that your associates already knew that you had been summoned here as a prospective or possible juror in the trial of this case? A. That is right.
>
> Q. Is that right? A. Yes.
>
> Q. And, having that in mind, you were quick to express your resentment of these prejudicial remarks; is that correct? A. Yes.
>
> * * * * *
>
> Q. Because you felt that that was an un-American statement to make, did you not? A. Yes.
>
> Q. And you are in favor of the policies of the law that a fair trial must be accorded all men; is that correct? A. That is correct.

Q. And you felt that that kind of talk was unjust and unfair and illegal; is that correct? A. That is correct.

Q. Because it might possibly prejudice a defendant and deprive him of a fair hearing upon a trial; is that correct? A. Yes, sir.

Q. And that is your state of mind now, as you sit here? A. It is.

Q. And were you sworn as a juror you could approach the issues in this case without any prejudice against any defendant; is that correct? A. I feel sure I could.

* * * * *

Q. Reverting for a minute to those conversations that you had with your associates at the United States Envelope Company, were the participants in that conversation or those conversations your superiors? A. No, they were my equals. In other words, in the same capacity as I am.

Q. They were sales representatives? A. That is right, other types of the company.

Q. You would not feel beholden to anybody for the propriety of your verdict in a case of this kind, would you? A. I did not hear the question.

Q. I say you would not be beholden to anybody for the propriety of your verdict in a case of this kind, would you? A. No, I would not.

Q. In other words, in a matter of this kind you swear to do your honest duty, assuming that you are chosen as a juror; is that correct? A. That is right.

* * * * *

Q. Would you feel reluctant to do your sworn duty by reason of the fact that somebody having nothing to do with the administration of justice, somebody who by accident was an associate of yours in a commercial firm, in your place of employment, somebody had perhaps intimated that he would not have agreed with that—would that influence you at all? A. It would have no bearing on the matter.

Q. Assuming that you did bring in a verdict of Not Guilty, you would not be reluctant to meet with your associates again, would you? A. No reason why I should be.

Q. You would not feel reluctant to bring in such a verdict because it might be in the back of your mind that, having done it, brought in a verdict of Not Guilty, it involved a certain mental courage on your part to meet with these co-employees who possibly harbor a different view? A. It would have no bearing on the matter at all" (V. 370-374).

It is no wonder, therefore, that at the end of the examination defense counsel announced that Mr. Stevens was

"Satisfactory to the defendants" (V. 391).

(b) *The Last Three Jurors.*

Petitioners say that the last three jurors "were selected after petitioners had exhausted all of their peremptory challenges" (Brief, pp. 24, 26). That is not correct. We proceed to prove it.

After the ninth juror was accepted two prospective jurors (Mr. Andrews and Mr. Rorke) were called for questioning. The examination of Mr. Andrews failed to disclose the slightest basis for interposing a challenge for cause (V. 1900-1904, 1908-1918). He stated that he had not formed any impression about the case or the defendants (V. 1909-1910) and that he knew of no reason which would prevent him from presiding as a fair and impartial juror (V. 1918). Under these circumstances counsel did not challenge for cause but merely stated that they had no further questions to ask (V. 1930).

But before Mr. Andrews was challenged peremptorily, the questioning to determine the fitness of Mr. Rorke was commenced. It developed during his examination that he was the nephew of a police inspector "in charge of traffic" (V. 1918). He stated that he had no impression adverse

to any defendant (V. 1922), that if accepted as a juror he would "do justice" by his verdict (V. 1906) and that there was nothing to prevent him from rendering "a just verdict" under his oath (V. 1907).

Defense counsel, however, challenged him for "implied bias" (V. 1922). Mr. Rorke was not disqualified under any of the grounds specified by statute as constituting implied bias.[13] Counsel, therefore, appealed "to the discretion of the court" (V. 1925).

When the challenge was overruled a discussion was had, not within the hearing of the jurors (V. 1928-1930). In this discussion counsel urged that if their challenge for implied bias was not sustained, they would be compelled to use their last peremptory challenge, which would leave them without the power of peremptorily challenging the other juror (V. 1928-1929). The court, however, adhered to its original decision. Whereupon Mr. Rorke was again questioned. In this second examinaton Mr. Rorke stated that he was not prejudiced, that he would accord the defendants the presumption of innocence, that if chosen as a juror they could rely upon him "for the preservation of every right that the law gives", and that if there should be a reasonable doubt of guilt in his mind he would give them the benefit of such doubt (V. 1932, 1934).

Thereafter, Mr. Andrews, *whose fairness was at no time questioned*, was peremptorily challenged by the defense (V. 1935). It is thus evident that petitioners, with full and unrestricted power to exclude Mr. Rorke, chose to have him as a juror. That there was no basis to challenge him for cause we have already demonstrated.

We now come to Mr. Link, who was the eleventh juror. His examination appears in Volume VIII at pages 1959-1981. A reading thereof shows that there is not a single word to suggest bias or prejudice. The innuendo conveyed

13. Under the N. Y. Code of Criminal Procedure, § 377 a juror can be challenged for implied bias for eight specific reasons, "and for no other" (Appendix, *infra*).

at page 25 of petitioners' brief by the statement that Mr. Link "had been called into consultation with reference to a radio program called 'Mr. District Attorney'" is unwarranted. The fact is that he was a radio announcer on a *fiction* program called "Mr. District Attorney" (V. 1960, 1977). Typical of this man's qualifications to serve as a juror are his answers to the concluding questions put to him by counsel for Buchalter. We quote from the record:

> "Q. Can Mr. Buchalter as an individual depend on you and entrust to you his keeping and preservation?
> A. Yes, sir.
> Q. Without any sympathy or bias or prejudice?
> A. Yes, sir.
> Q. I take it you will consider your oath on that?
> A. Yes, sir" (V. 1971).

And on questioning by counsel for Weiss, he said:

> "Q. Do you realize that if you are selected as a juror, under your oath you must determine and find according to the way you regard the facts?
> A. That is right.
> Q. Without fear or favor or prejudice or bias?
> A. Yes, sir.
> Q. And can you do that?
> A. Yes, sir" (V. 1972-1973).

None of the counsel challenged him for bias, actual or implied. They merely said, "We rest on the record" (V. 1981).

As to the twelfth juror, John E. Coleman, the record shows that he was eminently qualified to serve (V. 1983-1995). Two illustrations will suffice. Upon being questioned by counsel for Buchalter the juror said:

> "Q. While you were sitting here did anything occur in the courtroom to cause favor or prejudice to either side?
> A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. I take it you realize as well as anyone else the extreme importance of getting an impartial jury?

A. Yes, sir.

Q. So that now there is no prejudice in your mind, or anything at all which would preclude you from giving Mr. Buchalter a fair trial?

A. Nothing (V. 1990).

* * * * *

Q. The law says that every defendant is entitled to a fair trial at your hands. Will you give it to Mr. Buchalter?

A. Yes, sir" (V. 1993).

And under questioning by counsel for Capone:

"Q. Have you had any discussion at all about this case?

A. No, sir.

Q. Have you formed any impression of any character in the courtroom?

A. No, sir.

Q. Your mind is clear now as to the fact that you can sit here as a fair and impartial juryman and take the evidence from the witnesses?

A. Yes, sir" (V. 1993).

Here again counsel said, "we rest on the record" (V. 1995), but made no challenge.

It is thus clear that there is no basis whatever for the assertion that petitioners were not tried by a fair and impartial jury.

The Court's Conduct in the Selection of the Jury.

At page 20 of petitioners' brief the statement is made that "This jury was selected only after repeated efforts of the trial judge to induce talesmen to abjure prejudice

whether or not actually entertained". And at page 43 of their brief they say: "A jury was selected only after the court had browbeaten talesmen, thereby leading others in the panel to deny prejudice to avoid criticism".

This startling accusation is devoid of any sound support and is based solely upon fanciful imagination. The record shows that immediately before the questioning of jurors began the court said:

> "The Court will allow abundant latitude to all counsel to make searching examination of every member of the panel who is drawn, for the purpose of determining whether such member has any prejudice that will prevent a fair and impartial trial of these defendants" (V. 49).

That this was done is overwhelmingly proved by the record. Approximately four weeks were consumed in questioning of jurors. The transcript is over two thousand pages (Vols. VI to VIII). No greater latitude could have been given defense counsel than was allowed in this case. Finally, as conclusive proof of the complete lack of substance in petitioners' accusation, we find that before administering the oath the court took the following precaution to avoid any possibility of any juror having become biased or prejudiced after he was selected:

> "The Court: Before selecting the alternates, of course, the oath will have to be administered to the jury. This question is asked of all twelve members of the jury: Since you were tentatively accepted by both sides at the conclusion of your examination, you have been repeatedly cautioned by the Court not to discuss the case, not to let anybody talk to you about it, not to read the newspapers or otherwise read about it, not to listen to the radio about it. I am going to ask each one of you gentlemen individually if you have strictly followed those instructions.
>
> (Mr. Stevens, Mr. Prentice, Mr. Murphy, Mr. Day, Mr. Gill, Mr. Cummings, Mr. Hall, Mr. Cross, Mr.

Butt, Mr. Edghill, and Mr. Rorke each answered individually, "I have.")

The Court: Mr. Link, I do not have to ask you; you were only accepted this morning" (V. 1981-1982).

Thereafter the court, pursuant to counsels' suggestion, asked the following question:

"The Court: The question is now: Has anything happened to change your viewpoint in regard to the case in the meantime, to change your attitude as impartial jurors? If so, raise your hand.

(Juror No. 9, Mr. Butt, raises his hand.)

The Court: This will have to be at the bench, and not in the hearing of the jury" (V. 1982).

Mr. Butt was then invited by the court to state what had happened. He replied that "*Based upon the various questions that have been asked in court*" he developed a "conviction towards prejudice in this case" which he was "afraid" would prevent him from rendering a fair and impartial verdict (V. 1982). The court then excused the juror stating,

"This is in fairness to the defense. The man has a feeling in his mind which he has frankly expressed. The Court believes it to be an honest one" (V. 1983).

Thereafter, another juror was chosen in Mr. Butt's place.

The Trial.

Petitioners suggest that they were subjected to "a speedy trial" where their rights were "trampled upon" (Brief, p. 45). The fact is that the trial lasted eleven weeks (R. 1030). In these lengthy proceedings petitioners were "zealously—even hotly—defended by experienced counsel" (289 N. Y. at p. 224, per Lehman, Ch. J.). "Buchalter and

Weiss were each represented by two attorneys, each of whom was permitted by the court to participate actively in the trial" (289 N. Y. at p. 183, per Conway, J.). At every stage of the proceedings the requirement of due process of law as guaranteed by the Federal Constitution was fully observed. Indeed, with the single exception of Capone's obviously flimsy assertion that under the Constitution of the United States he was entitled to a separate trial (R. 36-37), the able counsel for petitioners never complained, either prior to or during the trial, of any deprivation of a right, privilege or immunity under the Federal Constitution.

They now come to this Court and complain about several rulings during the trial which they claim deprived them of due process of law. We proceed to state the facts as to each of those complaints.

(a) *As to the Alleged "Suppression of Evidence".*

Immediately before the cross-examination of the people's witness Berger, a request was made for official records of the Police Department of the City of New York, known as "D. D. 4's". These records were reports made by police officers of the movements of various underworld characters including Buchalter (R. 1881, 2142-2143).

The court's denial of permission to inspect those reports, it is claimed, constituted a suppression of material evidence. Petitioners say (Brief, p. 57):

> "Not only were petitioners deprived of the essential right of cross-examination of the prosecution witnesses, Rubin, Tannenbaum and Berger, in respect of any disparity between the testimony of these witnesses and the reports of the police officers, itself a deprivation of due process of law, but the petitioners were deprived of a fair opportunity to present their defense affirmatively."

Now, as to the facts.

When the court ruled against the requested inspection of the reports, counsel for Buchalter said:

> "Mr. Barshay: * * * Whether or not the D. D. 4's had anything to do with this case, they are only concerning the movements of the defendant Buchalter in the years 1935, 1936 and 1937 in Manhattan and have absolutely no bearing upon this case.
>
> The Court: I know nothing about it. * * * If you wish you can have it marked for identification *and then offer it in evidence*, and if there is an objection the Court will rule.
>
> Mr. Barshay: *May we have them marked for identification?* * * *" (R. 1881-1882).

Later, in the absence of the jury, and while the witness Berger was still under cross-examination, the request for the police reports was repeated. At that time counsel for Buchalter said:

> "* * * If your Honor pleases, those are not records having to do with this case as a case but rather are they records having to do, as I understand the situation, with the work of the Police Department of the City of New York during the period from about September of 1935 to the end of 1936 in respect to the surveillance by agents of that department of one of the persons on trial" (R. 2141-2142).

The court then made the following inquiry:

> "The Court: Are they required in connection with the examination of this witness?
>
> Mr. Climenko: *They may be, your Honor,* * * *" (R. 2142).

Thereafter, the court asked the prosecuting attorney the following questions:

> "The Court: I am asking you this: Do they contain any Q's and A's by witnesses in this case?

Mr. Turkus: They do not.

The Court: Do they contain any depositions by witnesses in this case?

Mr. Turkus: They do not.

The Court: Are they purely police reports?

Mr. Turkus: They are police confidential reports of activities of the Police Department.

The Court: No depositions?

Mr. Turkus: No depositions.

The Court: No admissions?

Mr. Turkus: No conversations, no admissions that I could find. They are about three inches thick" (R. 2146).

When the court asked Buchalter's counsel what he desired to have done so that the court could make an intelligent ruling (R. 2146), he replied:

> "Mr. Wegman: These records of the police department show the report of these police officers as to where the defendant Buchalter was, and with whom he spoke, and who spoke to him, over the period of time as to which these witnesses have testified. It is important for the purpose of contradicting the testimony of the witness Rubin and of the witness Berger to show that the police department's own records indicate that their testimony could not have been true" (R. 2147).[14]

Later, another counsel for Buchalter said they wished to inspect the reports

> "*to see whether or not there is something in those records which would dispute the truth of their (Rubin's and Berger's) allegations*" (R. 2151).

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14. In the brief filed with this Court it is said at page 55: "What these reports disclosed, petitioners have no way of knowing. Whether they were complete or not, petitioners cannot know."

Finally, the court, in denying the request said:

> "The Court: If a policeman took the stand and testified otherwise, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling, but that is not present at this moment. Now as it stands, in addition to the fact that these are privileged and confidential under the law, they are hearsay" (R. 2151).

At no time did the court preclude petitioners from offering any defense they pleased. At the end of the people's case petitioners were free to call the Police Commissioner, or anyone else in authority, to reveal the names of the officers who made the reports and then to call such officers to testify on any competent matter. As we have noted the court specifically informed defense counsel that "if a policeman took the stand * * *, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling" (R. 2151). But counsel failed to do so. Instead, they preferred to attempt in summation to induce the jury to draw an unfavorable inference against the prosecution because it did not call the police officers as witnesses (R. 3589-3592). And they also obtained an instruction from the court that "the jury may draw no unfavorable inference because of the defendants' failure or neglect to call any particular witness" (R. 3933).

The reason for the defense strategy is revealed by the finding of the Court of Appeals which examined the police reports. The court said:

> "This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The ruling was correct on the facts presented. (See *People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24.) The records in question were deposited with this court

> at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. *The reports established that the defendant could and did elude the police at will*" (289 N. Y. 244 at p. 245; Italics supplied).[15]

(b) *As to the alleged "show of force".*

1. Under a heading called "The Physical Trappings of the Trial" petitioners complain that they "were brought into the courtroom manacled to police officers" and that "the process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box" (Brief, pp. 28, 46). This, it is contended, was "manufactured" by the State and "placed before the jury" for the purpose of conveying the belief that petitioners were "desperate criminals".

That petitioners were desperate criminals was conclusively established by the evidence and did not need any further support. As stated by Chief Judge Lehman, the evidence showed that petitioners "were members of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer" (289 N. Y. at p. 228). Indeed, the evidence was so strong that even "counsel for the defense did not attempt to picture the defendants as honest, law abiding citizens" (*Idem.*). We quote from the summation of Buchalter's counsel:

> "I said I did not represent an angel, I meant just this: *I condemn the defendant Buchalter's past life with as great vehemence as I possess.* I am not in

15. In this connection it is significant that in summation to the jury Buchalter's counsel said: "What right have we to assume that the police assigned to do their duty were not watching *at least the front entrance of number 200 Fifth Avenue, the side entrance or the one in the rear.*" (R. 3592)

sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid because some of them hoped, by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. *I condemn every act of the defendant Buchalter's past life* (R. 3546-3547).

* * * * *

So, gentlemen do you get my point—that Buchalter, who was being looked for by Dewey *as king of the flour racket and king of the crime racket*—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible misdemeanor? I say, 'Possible misdemeanor' at the hands of Rosen. * * * What was there that Buchalter had to fear at the hands of Rosen *with thousands of complaints running to Dewey in extortion totaling a half a million dollars?* (R. 3584-3585).

* * * * *

You know that Lepke (Buchalter) was not just an ordinary racketeer" (R. 3589).

True it is that Buchalter's counsel told these things to the jury for the purpose of showing that "the position of the defendant Buchalter was so important that it was incredible that there was any reason for the defendant Buchalter to order or direct Rosen's death" (289 N. Y. at p. 184). None the less, the stubborn fact remains that his disclosures far outweighed the conjectural prejudice which petitioners claim arose from the fact that they were brought to and from the courtroom in manacles.

Moreover, the precautions taken to prevent their escape were proper,[16] and would hardly have been noticed by the jury had not defense counsel directed attention to it. We quote from the record:

> "The Court: * * * Did I understand you to say that the defendants are brought in in chains?
>
> Mr. Talley: Yes.
>
> The Court: You mean they are manacled?
>
> Mr. Talley: Yes, sir, manacled with these officers that are with them.
>
> The Court: At the present time?
>
> Mr. Talley: No, the manacles are removed when they come in the courtroom, but not before; when they are seated and not before; and your Honor requires the jury to be in their seats so they can see this spectacle of how these men are brought in.
>
> The Court: Do you impugn the Court's honor? The Court does not require the jury to be in their seats in order to see 'the spectacle,' because the Court is not aware of it; and the Court has not been aware of it until you just informed the Court to that effect. This compels, being before the jury, a ruling in the presence of the jury, and that is, so far as the custodianship is concerned, until the defendants enter the courtroom and are seated it is not within the Court's jurisdiction, and is not under the Court's direction. That is a responsibility that is elsewhere charged. But at no time during the trial will the Court permit any defendant to sit here manacled, and, so far, as the Court is informed by you, the defendants have not sat here manacled" (R. 766-767).

In connection with the court's ruling it is to be recalled that the Attorney General of the United States consented to the production of Buchalter and Weiss for trial in Kings

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16. For similar situations where such precautions were held to be proper see *Kelly* v. *Oregon*, 273 U. S. 589, 591; *State* v. *Temple*, 194 Mo. 237, 248; *People* v. *Kimball*, 5 Cal. Rep. (2d) 608.

County upon condition that they "should at all times remain in the custody of the United States Marshall" (R. 126-127).[17]

2. Petitioners also assert that "witnesses for the prosecution, when on the witness stand, were surrounded by police and court officers" and that the "insidious suggestion to the jury" was that these witnesses had "to be protected" against petitioners (Brief, pp. 28-29).

To begin with, the witnesses referred to were the murderers Bernstein, Tannenbaum, Berger and Magoon, all of whom were petitioners' employees and were held in police custody. Secondly, the description that they were "surrounded by police" is misleading. The court accurately described the scene as follows:

> "The Court: In the courtroom, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I presume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial" (R. 688-689).

And finally, the jury was informed that this was not an exceptional set-up and that it was the usual practice followed in all cases for the purpose of preventing escape of witnesses in police custody. The court said:

> "The Court: All right, for the purpose of the record —*the set-up is the usual one which is followed in this court in all cases so far as the Court can recall.* When

17. As was said in *Ponzi* v. *Fessenden*, 258 U. S. 254, at p. 260, "The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer."

witnesses are brought in, in custody, detectives who are charged with the custody—that is, detectives or other officers or jailers who are charged with the custody, stand back in the corner, substantially out of sight of the jury, but close enough not to lose technical custody. Then the two attendants of this court stand, first the Judge's personal attendant, directly behind the prisoner witness, and next another one, in a position where he can guard the door, which is directly to the left of the witness stand and which opens into the Judge's chambers, *and provides a means of escape. There is nothing unusual about this*, so that is not considered seriously, and it is denied" (R. 765-766).

The "insidious suggestion to the jury" complained by petitioners is thus a figment of their imagination.

(c) *As to the prosecutor's summation and the court's charge to the jury.*

Petitioners' arguments in this respect are based upon isolated excerpts, paraphrase and inference, without regard to the arguments they presented in their summations which occupy over two hundred pages of the record (R. 3543-3782). A reading thereof shows that counsel for petitioners appealed to every possible prejudice that might influence the jury and had in it every technique to confuse and divert the jury from the real issues in the case. It would unduly prolong the length of this brief to discuss their many transgressions. We think it suffices to say that an examination of the summation by the prosecuting attorney shows it to be a fair reply to the arguments made for the defense. It must be remembered that eleven weeks of anxiety and strain would necessarily strike occasional sparks from the temper of counsel and give momentum to overforceful expression. Under such conditions it would be too much to expect summations to be couched in the carefully weighed and measured language of judicial opinions. Indiscreet statements were bound to occur.

As for the court's charge to the jury, it appears at pages 3871-3991 of the record. The parts criticized are discussed in the majority and dissenting opinions of the Court of Appeals (289 N. Y. 181-243). We need only add that the trial court repeatedly instructed the jury, with great emphasis, that they were the sole judges of the facts, that the credibility of witnesses was for them to determine (R. 3874, 3880, 3890, 3902, 3903), and that,

> "The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy (R. 3871).
>
> * * * * *
>
> The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both—fairly, without prejudice or sympathy to either the defendants or to the people of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of a case in court, according to the accepted standards, means (R. 3872).
>
> * * * * *
>
> As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice" (R. 3873).

(d) *As to the defense.*

In view of petitioners' reliance upon Judge Rippey's dissenting opinion wherein he said that the conduct of the trial deprived petitioners "of any free consideration by the jury of their defenses", it is well to note that none of the

petitioners took the witness stand. Capone offered no defense whatever. In the case of Buchalter, Judge Conway said (289 N. Y. at pp. 210-211):

> "* * * so weak was his defense that great harm might have been occasioned to Buchalter if the court had attempted to analyze the testimony of the witnesses called by him."

And Chief Judge Lehman in his concurring opinion added (289 N. Y. at p. 227):

> "Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony."

Review by the Court of Appeals.

Petitioners contend that the Court of Appeals arbitrarily refused to review the rulings on challenges for "actual bias" and they urge that this presents a question "whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may unwittingly be waived and lost".

These contentions present a non-existent issue. The opinion of the Court of Appeals denying the motion for reargument said (289 N. Y. 244, at p. 245):

> "This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, art. 18-B; Cons. Laws, ch. 30) the defendants appeared by attorney and consented to be tried before such special jury. A majority of this court is of the opinion that they thereby consented also to the statutory provision (Judiciary Law, § 749-aa, subd. 7) that rulings of the trial court upon challenges for actual bias are final and not appealable."

We have seen that only Mr. Rorke was challenged for "implied bias" and that as to Mr. Link and Mr. Coleman petitioners merely "rested on the record" and made no challenge for bias, actual or implied. The other nine jurors were pronounced "satisfactory to the defendants". Consequently, the holding of the Court of Appeals that by virtue of the Judiciary Law the "rulings of the trial court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict. Petitioners' contention, therefore, that the decision of the Court of Appeals deprived them of "the right to question the fairness and impartiality *of the jury impanelled*" (Brief, pp. 51-52) raises a false issue.

Finally, the opinions of the Court of Appeals show a most careful and conscientious consideration of the case. Briefly stated, the majority of the court held that petitioners were found guilty upon legally sufficient evidence and that they had a fair and impartial trial. Judge Conway, in whose opinion Judge Lewis and Judge Finch concurred, found after a detailed analysis of the facts (289 N. Y. at pp. 185-198) that the guilt of Buchalter and Weiss "was clearly established" and that Capone's guilt "was peculiarly a jury question" which was "properly left to the jury" (289 N. Y. at p. 221).

In a separate opinion Chief Judge Lehman pointed out that in reviewing a capital case the Court of Appeals must determine not only whether the verdict is against the weight of evidence but also "whether justice requires a new trial" (289 N. Y. at p. 223). He further noted that it was the court's "duty to determine whether errors or defects, if any, have tainted the jury's verdict and may have deprived the accused of his right to a judgment of a jury of his peers, arrived at after a fair trial conducted in accordance with the law" (289 N. Y. at p. 224). After thus describing the extent of the review given to the case Judge Lehman held that although there were "errors and defects", they

could not have had the effect of depriving petitioners of a fair trial. He said (289 N. Y. at pp. 229-230):

> "The verdict of the jury rests, it is plain, on its conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on the appeal may have affected that appraisal. * * * I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as a part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

ARGUMENT.

"It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record" (*Glasser* v. *United States*, 315 U. S. 60, 88). This "regrettably familiar phenomenon" (*Idem*) is given fresh point in petitioners' briefs. Not only are important facts having a direct bearing on the questions presented omitted, but by faulty paraphrasing and in some instances misguided distortions of the record the realities of the trial are beclouded and submerged while occurrences of little importance in their setting are magnified far beyond their true significance. We find that, in the main, petitioners' arguments rest on isolated excerpts wrenched from their

context and considered without any regard for what preceded or followed.

To evaluate their contentions in true perspective and to perceive more sharply the precise issues involved it is, of course, essential to "re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions" (*Johnson* v. *United States*, 317 U. S. —, Decided Feb. 15, 1943, 87 Law ed., Adv. Op., 496, 503). "Asserted denial (of due process of law) is to be tested by an appraisal of the totality of facts in a given case" (*Betts* v. *Brady*, 316 U. S. 455, 462).

When thus tested there is no room for fair argument that petitioners were denied due process of law, which, as applied to a criminal case, means the failure to observe that fundamental fairness "essential to the very concept of justice" and that "the acts complained of must be of such quality as necessarily prevent a fair trial" (*Lisenba* v. *California*, 314 U. S. 219, 236).

The guides for decision are clear. Such unfairness exists where an accused in a capital case is denied the right to be represented by counsel (*Powell* v. *Alabama*, 287 U. S. 45); where by the active conduct or the connivance of the prosecutor a conviction is obtained through the use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227); where in the selection of jurors to be called for service discrimination is practiced because of race, color or creed (*Norris* v. *Alabama*, 294 U. S. 587); where an accused is subjected to a trial under a system by which the judge is paid for his service only when he convicts the defendant (*Tumey* v. *Ohio*, 273 U. S. 510); or where the trial is dominated by mob violence in the courtroom so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86; compare *Frank* v. *Mangum*, 237 U. S. 309).

The case at bar is outside the scope of those decisions. In their brief, counsel for petitioners rely on several of the

cases above cited and quote excerpts therefrom, such as the one in *Moore* v. *Dempsey (supra)* where this Court in holding there was a denial of due process of law said that "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion and that the state courts failed to correct the wrong".

But "Sentences in judicial opinions are misleading if taken out of their context and read as if they were the gist of the decision. Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority" (*People* v. *Nebbia*, 262 N. Y. 259, 270). As was said by Mr. Justice Cardozo:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence" (*Snyder* v. *Massachusetts*, 291 U. S. 97, 114).

Petitioners' version of the case at bar may appear to fit the words used by this Court in other situations, but, garbled as that version is, it cannot be made to fit the facts of those cases. Thus, for example, the above quoted statement from *Moore* v. *Dempsey* was "wrought under the pressure" of the following uncontradicted facts as stated in the opinion of Mr. Justice Holmes (261 U. S. 86, at pp. 89-90):

> "* * * the committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. * * * the petitioners were brought into court, informed that a certain lawyer was appointed their counsel, and were placed on trial before a white jury, —blacks being systematically excluded from both grand

and petit juries. The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had no preliminary consultation with the accused, called no witnesses for the defense, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour, and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. * * * no juryman could have voted for an acquittal and continued to live * * *, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob."

It requires a gross distortion of the facts for petitioners to say, at page 44 of their brief, that "*The spirit which permeated the panel was no different from that of the mob which this Court condemned in Moore* v. *Dempsey*"—a panel which we have shown counsel for petitioners deliberately refrained from discharging although given the opportunity to do so by the trial court. In view of the facts in the case at bar we say that the foregoing assertion, as well as many others of similar quality, is shocking and represents a desperate attempt to set free vicious leaders of organized crime.

The fact that Buchalter, because of his breath-taking criminality for many years, received wide notoriety by press and radio as "society's most dangerous enemy" does not justify the claim that he and his associates were tried in "a poisoned atmosphere" where they could not receive a fair trial. "If newspaper articles furnished ground for removal, no defendant could ever be tried for a spectacular crime" in the county of indictment (*People* v. *Brindell*, 194 N. Y. App. Div. 776, 781). Moreover, the newspaper comments were not limited to the city of New York. We quote

from the affidavit of counsel for Capone, filed June 5, 1941, on his application for a separate trial:

> "The defendant Louis Buchalter, alias Lepke, is a person of national prominence * * * whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42).

So too, counsel for Weiss in a similar application on August 4, 1941, said:

> "Louis Buchalter, generally known as Lepke, is hailed throughout the press of not only this county but of the city and I dare say the country at large, as the leader of a band, etc." (V. 28).

And Mr. Justice Daly in denying the motions for change of venue held:

> "It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners in the city and state of New York" R. 165-166).

The record further shows that experience in the Boroughs of Manhattan and Brooklyn has proved that its citizens do not become "poisoned" by newspaper stories. "In the much publicized case of *People* v. *Hines*, the pretrial newspaper accounts concerning the corrupt and criminal alliance of Hines with the underworld were much more constant and voluminous than the newspaper items printed with reference to the case at bar" (R. 134). In answer to the contention that because of such publicity Hines could not receive a fair trial in New York County, Mr. Justice Pecora said:

> "Any resident in this county must recognize the fact that it has a most cosmopolitan population, eminently fair and tolerant in its sentiments. That its people are capable of using discrimination in the formation

> and exercise of their individual judgment has often been demonstrated at the polls where they have voted in large majorities against predominating newspaper opinion and exhortation" (*People* v. *Hines*, 168 N. Y. Misc. Rep. 453, at p. 470).

In the final analysis, therefore, the sole question on the motions for a change of venue was whether there existed in the County of Kings such prejudice as would prevent a fair trial. Upon that question petitioners were given a full hearing in the Supreme Court on two successive occasions before different Justices of that court (R. 155-163, 175-176). In denying the motions Mr. Justice Daly said:

> "After a careful consideration of the application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. * * * It is inconceivable that in a cosmopolitan community such as Kings County, with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence" (R. 165-166).

Such a jury, we have demonstrated, was in fact obtained. The first nine jurors were pronounced by petitioners as "satisfactory to the defendants" at a time when they had not exhausted their peremptory challenges. Two of the other jurors were not challenged for bias, actual or implied. And the third, although challenged for "implied bias", was seated as a juror when petitioners had it in their power to excuse him by using their last peremptory challenge against him. Instead, they used that challenge against a juror whose fairness they at no time impugned.

Now come petitioners and tell us that "While the jurors said they were unbiased, and swore to act impartially, it is clear that their frame of mind was such that they did not 'stand indifferent between the parties'" (Brief, p. 42). Such

clairvoyance must surely be envied, but hardly trusted. For, "While bias, as has been said, is 'an elusive condition of the mind', that consideration affords no ground for extreme and fanciful tests" (*United States* v. *Wood*, 299 U. S. 123, 150). As was recently observed by this Court, per Frankfurter, J.:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustce and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States*, 317 U. S. 269, 281).

In Buchalter's petition for certiorari it was claimed (p 37) that "the Court of Appeals refused to review the question of whether * * * a change of venue should have been granted". To eliminate any possible doubt, we quote from Judge Conway's opinion:

> "Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants' claim for a number of reasons.
>
> In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, 'No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *.'
>
> The motion was addressed to the sound discretion of the court. We are not prepared to say on this record

that its denial was an abuse of discretion (*People* v. *Hyde*, 75 Misc. 407 [opinion by Mr. Justice Lehman, now Chief Judge of this Court]; aff'd., 149 App. Div. 131; *People* v. *Brindell*, 194 App. Div. 776, 781; *People* v. *Hines*, 168 Misc. 453, 470; *People* v. *Sarris*, 69 App. Div. 604). This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance" (289 N. Y. at pp. 220-221).

And in denying the motion for reargument the court said:

"This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter of law by the Justices of the Supreme Court in denying the motions for a change of venue. A majority of the court is of the opinion that the discretion was properly exercised" (289 N. Y. at p. 245).

Surely, this decision does not involve a Federal question. "Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282.) In the *Barrington* case, just cited, the defendant applied for a change of venue on the ground of local prejudice. His motion was denied, and he was convicted of murder in the first degree. This Court in dismissing his application to review for want of jurisdiction said (p. 485):

"*In our judgment no Federal question was involved.* Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the state, although the supreme court of that state had held to the contrary."

The same holds true as to the denial of Capone's motion for a separate trial. Both under Federal and State law

the granting or denial of such a motion is discretionary (*Stilson* v. *United States*, 250 U. S. 583; *People* v. *Doran*, 246 N. Y. 409, 424). It certainly does not raise a question of due process of law under the Fourteenth Amendment.

So, too, the claims concerning challenges for cause against jurors who did not participate in the verdict and concerning the non-reviewability of rulings on such challenges do not present a constitutional question. A right of review by appeal is not an essential element of due process of law (*McKane* v. *Durston*, 153 U. S. 684, 686; *Reetz* v. *Michigan*, 188 U. S. 505, 508). It rests entirely with the legislature. Thus subdivision 7 of section 749-aa of the New York Judiciary Law, abolishing the right of appeal on challenges to special jurors has been held constitutional (*People* v. *Dunn*, 157 N. Y. 528). Since in the instant case petitioners were in fact tried by a fair and impartial jury they have no basis for complaint (*Spies* v. *Illinois*, 123 U. S. 131, 168-180). As stated in *Brown* v. *New Jersey*, 175 U. S. 172, 175:

> "* * * the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained' *Hayes* v. *Missouri*, 120 U. S. 68, 71."

The criticism against the trial judge seems to be based on the notion that trial judges should be reduced to the humiliating position of having no right to say or do anything in a jury trial except to rule in monosyllables on questions presented by counsel; that they should do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds, or even prevent them from taking an unfair advantage by misleading the jury by false suggestions and the like.

"The trial judge is," however, "something more than a mere automaton." (*People* v. *Ohanian*, 245 N. Y. 227, 232.) He "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function, as at common law, is an essential factor in the process for which the Federal Constitution provides". (*Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 95.)

Trial by jury can never be an effective means for administering justice as long as it is characterized by appeals by able advocates to the emotions of untrained men with the judge muzzled and relegated to the side lines and not allowed any substantial part in the trial except to say "yes" or "no" to propositions drafted by counsel and used by them for partisan effect.

The notion that a jury, called upon to render a verdict on disputed facts and subjected to the obfuscating arguments of opposing counsel, are unable to reach a fair decision because the court seeks to help them by analysis and comment is absurd. The court has been trained to understand and clarify factual as well as legal intricacies, penetrate the devices of counsel and observe where the truth is apt to be. To deprive him of the right to aid the jury in arriving at a just verdict on the evidence would emasculate his usefulness. As was said by Dean Ezra Thayer (quoted in Wigmore on Evidence [3rd ed.] sec. 2551-a, p. 510):

> "In a long trial, perhaps involving hard questions of expert judgment, the business of weighing conflicting testimony is a serious task for men unused to analysis or to abstract ideas; and a system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal tyranny or lay magistrates, is today a senseless perversion."

Moreover, the charge to the jury fails to present any Federal question. No claim was made at the trial that it violated the Federal Constitution. Nor was any such claim made or decided by the Court of Appeals. The charge, therefore, is not reviewable here. As stated in *Franklin* v. *South Carolina*, 218 U. S. 161, 172.

> "The supreme court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to plaintiff in error which would warrant a reversal by this court. *These rulings were upon questions of general law, concerning which no Federal right was asserted and denied, as is essential to enable this court to review the judgment of a state court.*"

The criticism of the trial judge for permitting petitioners to be manacled to police officers while being brought to and from the courtroom is certainly unwarranted. Where, as here, the defendants on trial for murder are desperate and dangerous criminals, such precautions must be taken to prevent their escape. (*Kelly* v. *Oregon*, 273 U. S. 589; *State* v. *Temple*, 194 Mo. 237; *People* v. *Kimball*, 5 Cal. Rep. [2d] 608.) It is specious to contend that by so doing their constitutional rights were violated. The words of Judge Cooley, a great judicial interpreter of the organic law, are quite pertinent. He said (*People* v. *Murray*, 52 Mich. 291):

> "I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any others; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct."

And this Court in a situation analogous to the one at bar said (*Kelly* v. *Oregon*, 273 U. S. 589, 591):

> "Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the

warden of the penitentiary, inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody, in order that he might fully make his defense, and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely free from custody (citing cases). There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit."

The same is true of the complaint against the presence of detectives in the courtroom when the people's witnesses were testifying. We have already stated the facts controlling this situation. It is pertinent here to quote the considered judgment of an eminent committee of the American Bar Association in their report on "Improvements In The Law of Evidence (Reports of the Section of Judicial Administration at Annual Meeting for July 25-27, 1938):

"10. *Intimidation of Witnesses.*

In most of the large cities there is probably more or less intimidation of witnesses in felony cases. This, when it exists, is the supreme disgrace of our justice. It is well-known to all that the success of the 'racket' is due chiefly to the lack of proof caused by the intimidation of witnesses. This intimidation takes place either in the court premises or outside of them.

(A) In the *court premises* it is the duty of the judge to install arrangements for protecting the witnesses, and also to instruct and require his bailiffs to exclude from the courtroom and its premises known bullies and touts. All this part of the remedy comes home to the judge's responsibility."

As to petitioners' request for permission to inspect the police department reports, it was clearly an attempt to go "upon a tour of investigation, in the hope that they would find something which would aid them" (*Arnstein* v. *United States*, 296 Fed. 946, 950). It is settled law, however, that "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered" (*People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 29; see also, *Goldman* v. *United States*, 316 U. S. 129, 132).

Conclusion.

That the trial was not faultless may be conceded, but "we cannot expect perfection on the trial of a criminal case" (*People* v. *Wilcox*, 245 N. Y. 404, 406). As stated by Chief Judge Lehman in the case at bar, "It is difficult, perhaps impossible to avoid all error upon such a trial" (289 N. Y. at p. 230). "The due process clause", however, "does not impose upon the States a duty to establish ideal systems for the administration of justice" (*Ownbey* v. *Morgan*, 256 U. S. 94, 110). Nor does it limit "the powers of the States to try and deal with crimes committed within their borders" or "bring to the test of a decision of this Court every ruling made in the course of a State trial" (*Avery* v. *Alabama*, 308 U. S. 444, 446-447). "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose" (*Sauer* v. *New York*, 206 U. S. 536, 546). And when federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded" (*Lisenba* v. *California*, 314 U. S. 219, 239).

We submit that such is not the case here. Petitioners were represented by able and experienced counsel, who were given ample opportunity to prepare for trial. The trial lasted eleven weeks. The widest latitude was given in the

selection of the jury, which resulted in obtaining fair and impartial jurors. Equally wide latitude was given to the defense in the cross-examination of the people's witnesses and in summations to the jury. And upon appeal to the Court of Appeals petitioners were given a full and conscientious hearing. In short, at every stage of the proceedings due process of law was had.

The words of Mr. Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S. 97, at p. 122, are quite apt here:

> "The constitution and statutes and judicial decision of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a fair trial because opinions may differ as to their policy of fairness. * * * There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

For the foregoing reasons the judgments below should not be disturbed.

Respectfully submitted.

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Appendix.

New York Judiciary Law.

"§ 749-aa. Special jurors in certain counties.

1. * * * * *

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. * * * * *

4. Application for [illegible] jury. Whenever an issue of fact has arisen in any civil or criminal action triable by a jury empaneled within the provisions of this section, the [illegible] attorney of the defendant, if in a criminal action,

or either party in a civil action may apply for a special jury to try such issue. * * * Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. * * *

5. * * * * *.

6. * * * * *.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. * * * * *.

9. * * * * *.

10. * * * * *."

Section 377 New York Code of Criminal Procedure.

"§ 377. Grounds of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action or having complained against, or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror." (L. 1881, ch. 442, sec. 377 in effect Sep't. 1, 1881.)